

**COMMISSION FOR MENTAL HEALTH,
DEVELOPMENTAL DISABILITIES AND
SUBSTANCE ABUSE SERVICES**

Rules Committee Minutes

**Clarion Hotel State Capital
320 Hillsborough Street
Raleigh, NC 27603**

Wednesday, April 15, 2009

Attending:

Commission Members: Anna Marie Scheyett, Jennifer Brobst, Richard Brunstetter, John R. Corne, Dorothy Rose Crawford, Sandra C. DuPuy, Mazie T. Fleetwood, Martha Martinat, Connie Mele, John Owen, Larry Pittman, Pamela Poteat, Don Trobaugh

Excused Absences:

Thomas Fleetwood, William Sims

Division Staff: Steven Hairston, Denise Baker, Marta T. Hester, Amanda J. Reeder, Andrea Borden, Tonya Goode

Others: Stephanie Alexander, Debra Dihoff, Erin McLaughlin, Louise Fisher, Annaliese Dolph, Michael Bishop, Diane Pomper, Sandy Ellsworth, Martha Brock, John L. Crawford

Handouts:

Mailed Packet:

- 1) April 15, 2009 Rules Committee Agenda
- 2) October 15, 2008 Draft Rules Committee Minutes
- 3) Senate Bill 721

Additional Handouts:

1. Senate Bill 799
2. Rulemaking Handout
3. Rulemaking Timeline Guide

Call to Order:

Dr. Scheyett called the meeting to order at 10:04 a.m. Dr. Scheyett asked for a moment of reflection for our troops, the vulnerable and oppressed people the Commission serves and remembrance of the two year anniversary of the Virginia Tech event. Dr. Scheyett asked all present to introduce themselves. Dr. Scheyett then read the Ethics Reminder.

Approval of the Minutes

Don Trobaugh asked that the minutes reflect the reason why he and other members may vote against a particular motion. Dr. Scheyett responded by suggesting that, in the future, anyone voting in the negative or abstaining from a vote who would like the reason for that vote to be reflected in the minutes should clearly state, during the vote, that they would like the minutes to reflect their opposition and the reason therefor.

Upon motion, second and unanimous vote, the Rules Committee approved the minutes of the October 15, 2008 meeting. There was one abstention (Jennifer Brobst).

Rulemaking Timeline

Dr. Scheyett reviewed the rules timeline guide with the Rules Committee members. The timeline guide reflects the rules that the Commission has worked with in recent years; the guide reflects the status of each rule listed. Dr. Scheyett wanted to discuss any outstanding rules and get updates on their progress from staff. Dr. Scheyett stated that following the discussion of the timeline guide, she wanted to transition into a discussion of the Commission's scope of authority to make rules and determine an agenda for the Rules Committee to follow in the future.

The following rules were addressed from the timeline guide:

High Risk/High Cost Consumer

Steven Hairston, Chief, Operations Support Section, NC DMH/DD/SAS, stated that this rule dates back three years. Mr. Hairston reviewed the history of this rule and explained that the Commission and the Division have struggled with this definition and were unsuccessful in generating language which differed from that contained in the statute. Ultimately, the NC Physicians Advisory Group (PAG) was asked to generate the definition for this term. However, this group could not come up with a clearer definition than the one already contained within the statute. At that time, the PAG made the recommendation to use the definition in statute rather than attempting to write a rule defining high risk/high cost consumer.

Don Trobaugh, Committee member, asked Mr. Hairston to give an example of a high risk/ high cost consumer. Mr. Hairston responded that it is a difficult concept to define. A high risk/high cost consumer is someone that constantly uses the mh/dd/sa system and whose care results in costs reflecting a high dollar amount.

Mr. Trobaugh stated that he felt this was a necessary rule and if broken down to its components, high cost could consist of very expensive medication or maybe psychiatric treatment or confinement, etc. Mr. Trobaugh further stated that if someone could establish thresholds, the rulemaking should be relatively simple. Mr. Trobaugh further asked why it is necessary to promulgate the rules, and asked what the consequences would be for failure to do so. Mr. Hairston stated that this rule was on the timeline guide because legislation gave the Commission authority to determine a definition for high risk/high cost consumers. He then read the statutory definition of high risk/high consumer (N.C.G.S. §122C-115.4(f)(1)).

Dr. Scheyett asked if the staff could get copies of the PAG report and recommendation. Dr. Scheyett stated this would allow the Rules Committee to study the issue to determine if the definitions need to be addressed in rule or if the definitions contained within the statute are sufficient.

Mr. Trobaugh stated that he has a problem with this rule, as it could be used as grounds for discrimination in not providing services to consumers. Mr. Trobaugh stated that when a person is identified as someone that will go beyond some particular financial threshold, that person could potentially be placed into a

situation where they will not receive services. Mr. Trobaugh stated that this discrimination happens within the medical community, especially in socialized medicine.

Dr. Scheyett closed the discussion on this rule by stating that the Rules Committee would attempt to get the information from PAG and then make a decision as to whether or not to revisit this rule.

Diversion of SA Admission from the Hospitals

Mr. Hairston stated an internal group within the Division and some outside individuals are working on this rule. The Committee will hear back from the group and will address this rule in the future.

Provider Endorsement

Dr. Scheyett requested clarification of the current status of these rules, listed as “in process”. Mr. Hairston stated that this means the rule is moving through the system. In this instance, the fiscal note is being developed and reviewed by the Office of State Budget Management. Once that process is complete, the rule will be reviewed by the Department before being submitted for publication and comment. The Rules Committee will review the rule following the publication period.

Prison Rules

Mr. Hairston stated a work group was organized last spring to address six rules. Connie Mele, Committee member, stated that she was a member of the work group, and they revised many of the prison rules under 10A NCAC 26D. Mr. Hairston stated that there are some procedural issues with the rules that the Division is addressing. In the process of the workgroup revising most of chapter 26D, some current rules were struck through while the language of others was lifted from its current location and placed within the body of a different rule without those changes being identified or explained. Given the significant changes made, the staff must now look at all original rules to see exactly what was moved, where it was moved and the reasons for those changes. Mr. Hairston stated that the staff is diligently working through the rules and there are currently some rules review hurdles the rules would be subjected to and the staff is trying to navigate through these hurdles.

Don Trobaugh, Committee member, commented that most corporations meet quarterly and they will restructure their priorities and asked why the Rules Committee does not classify the rules as high, medium or low. Mr. Trobaugh further inquired if it would be possible to bring everyone to the table at the beginning of the process in order to reduce the time involved in the rulemaking process. Mr. Hairston responded that he got involved in the Commission’s rulemaking process in 2003 or 2004. At that time, the Commission was working very diligently with Level III rules. Once the Commission got through the hurdles related to the Level III rules and adopted them, the Division then worked with the Commission to assist them in determining other areas for which the Commission had authority to promulgate rules. The Commission then decided to work on a small set of rules (between eight and ten); however, eight to ten rules are a lot of rules for any group to work on at one time. Mr. Hairston continued by stating the NC General Assembly passed legislation in the 2006 session that

resulted in about 28 rules for the Division and Commission to develop. Therefore, the timeline represents the original rules that the Commission decided to work on, as generated by a retreat and prioritized by members of the Commission, as well as the legislative mandates for rulemaking.

Mr. Hairston stated that he believes part of the reason that the rulemaking process takes so long is the time that it takes to get rules through each step. Mr. Hairston stated from the day someone thinks of an idea to make into a rule until the day that the rule is adopted, the structure in place means it can take around three years to pass the rule. This varies depending upon such things as the nature of the rule, the complexity of the issues involved, and changing priorities of the respective parties and/or agencies. Mr. Hairston suggested that perhaps the Committee could consider a process that streamlines the time involved in adopting, amending and repealing rules.

John Owen, Commission member, stated that the current rulemaking process of the Commission tracks the federal rulemaking procedure.

Dr. Scheyett stated that even without the Rules and Advisory subcommittees, the Commission only meets quarterly. Dr. Scheyett questioned whether removing the Committee meetings would streamline the process. Instead, she stated that the Commission may need to consider having condensed meetings or some other form of virtual meetings.

Mr. Trobaugh stated that he felt the process did not need to take so long, and by identifying the issues of utmost importance, the process could be streamlined. Mr. Trobaugh further stated that to say a rule takes two or three years to become a rule does not do justice to evaluating the rule. Mr. Trobaugh stated that if it is a needed rule and it takes three years it is almost a useless rule. Mr. Trobaugh stated that his point was there has to be a better way to cut a lot of months out of the rulemaking process.

Dr. Scheyett stated that the Committee would place on their agenda looking for ways to streamline the rulemaking process.

Mr. Hairston asked the Committee to keep in mind that there are several steps in the rulemaking process that are not controlled by the Committee or Commission. For example, the Rules Review Commission has a set time when they meet, and the NC Register has publication deadlines. Dr. Scheyett asked for staff to give the Committee an outline of the pieces of the rule process that are non-negotiable.

Dr. Brunstetter, Committee member, stated that he was struck by Mr. Hairston's comments, as it seemed the whole process was going along relatively smoothly until the General Assembly passed legislation mandating 28 more rules. Dr. Brunstetter asked if Mr. Hairston could say something about that process and whether there was a discussion between him and the General Assembly to agree upon the legislation requiring 28 rules to be passed. Mr. Hairston responded by affirming that during the 2006 session, there was discussion between the legislature and legislative liaisons of the Division and Department regarding the proposed legislation. Mr. Hairston stated that the General Assembly passed the

legislation to give the Commission authority to write rules, as well as giving the Department authority to write other rules. Mr. Hairston further stated that none of the legislation proposed in the session thus far requires rulemaking by the Commission nor the Department.

North Carolina Intervention Quality Assurance Committee

Mr. Hairston stated that the fiscal note for this rule is being prepared. The fiscal note will then be reviewed by the budget office and the Department. The rules will then be submitted for publication. Mr. Hairston added that this rule has a fiscal impact.

Dr. Scheyett stated that those were the rules that are currently pending for this coming year in terms of activities and rules that the Committee must address. Dr. Scheyett stated that the Rules Committee will need to discuss what other activities should be considered in the coming year.

Further Rulemaking Discussion

At this time Amanda J. Reeder, Rulemaking Coordinator, NC DMH/DD/SAS, gave an overview of the rulemaking process and the scope of authority for the full Commission. Ms. Reeder told the Committee about the process and highlighted parts of the process that are outside of the Committee's control, including publication of the proposed rule in the NC Register, and final approval of all rules by the Rules Review Commission.

Dr. Scheyett then opened the meeting for discussion, asking Committee members and the public what they believed should be a priority for the Rules Committee and the Commission.

Mr. Hairston stated that the Commission and the Department have not yet had time to go back through the rules and update what needs to be updated, because the system and the structure within the system has changed. Mr. Hairston suggested the Committee take a comprehensive look at the existing rules to update those rules so that the rules then meet the system and environment that they are working in.

Stephanie Alexander, Chief, Mental Health Licensure and Certification Section, NC Division of Health Service Regulations, stated she looked at some rules that are in the enhanced benefit services and did a cross-walk between those, comparing the service definitions and clinical coverage policy to the rules. Ms. Alexander stated that there were some disconnects between the rules and the service definitions. Ms. Alexander stated that the discrepancies were mostly technical. Ms. Alexander cited the following example: in order to get a license a provider is required to have to have a one to eight staff to client ratio; however, in order to be enrolled with Medicaid the provider's staff to client ratio must be one to six. Ms. Alexander further stated that the description of the scope is confusing and the provider is often unsure whether they are supposed to follow the service definition or the rule. Ms. Alexander closed with her suggestion that the Committee look at a cross-walk of the enhanced services and rules, and determine whether and where some rule changes would be needed to assist with the system transformation. Ms. Alexander added that DHSR had identified a list of rules that are either outdated, need correction or are simply very confusing and subject to wide interpretation.

John R. Corne, Committee member, stated that the Rules Review Commission (RRC) can object to rules passed by the Commission for MH/DD/SAS. Mr. Corne further stated that it is the position of the RRC that when an agency makes an amendment to an existing rule, the agency opens the entire rule for review by the RRC. Mr. Corne stated he was not trying to discourage the Committee, but instead urged them to use caution when amending rules.

Mrs. Dorothy Crawford, Committee member, asked how the rule became law if it was in conflict with Medicaid service definitions. Mr. Hairston responded that he has found that often, our system has issues with timing. Mr. Hairston further stated that as the system changed both at the federal level and at the state level and not all rules have not been amended accordingly.

Mr. Corne stated that during the initial phase of review the Committee would have to rely on Ms. Alexander's group to tell the Committee the practicalities of the conflicts and any suggestions about resolving those.

John Owen, Committee member, stated that he has worked on other committees to develop rules. Mr. Owen stated that in his experience, it is difficult to get the state and federal governments to communicate.

Don Trobaugh, Committee member, stated that he believed that the Rules Committee and the Commission are great resources for necessary changes. Mr. Trobaugh further stated that the Commission can work by filtering communication to the appropriate authority.

Mr. Corne proposed that the Committee do more business via email in order to prepare for the scheduled meetings.

Ms. Alexander stated that DHSR staff were planning to meet with the Division staff regarding service definition changes. Ms. Alexander added that Ms. Reeder would be present at that meeting. Ms. Alexander further stated that they have already begun having the conversation on how to make sure that rules keep up with service definitions. Ms. Alexander stated that she was happy to share any disconnects that the Division of Health Service Regulations has noted with Ms. Reeder in order to have those concerns brought before the Commission.

Debra Dihoff, Executive Director, National Alliance on Mental Illness NC, applauded the Committee for the work that they were doing and for thinking big regarding the direction of rules in North Carolina. Ms. Dihoff commented that she would support looking at revising the rulemaking process. Ms. Dihoff stated that many advocates will seek to have a law passed, as it is easier than having a rule passed. Ms. Dihoff added that she believed the Committee should make rules requiring a comprehensive array of services for different disability groups. Ms. Dihoff stated that when the system was reformed through statute, old rules were taken out regarding comprehensive arrays of services. Ms. Dihoff continued by stating that there is no requirement that each LME have the essential array of services that everybody needs.

Jennifer Brobst, Committee member, stated that she has had the opportunity during the last year to really look into some of the open meetings public record laws. Ms. Brobst stated that public comments are very important and beneficial to the Commission. Ms. Brobst stated she felt that both the Committee minutes and agenda were vague and were not useful to the public. Ms. Brobst expressed concern, and stated that the public would not understand what the Committee would be addressing by looking at the agenda in advance. Ms. Brobst stated that she wants the Committee to be more proactive in reaching out to all groups in North Carolina and ensure that they are aware in advance of the meetings what the topic of discussion will be.

Martha Martinet, Committee member, mentioned that the Committee had been discussing paperwork reduction and how there was so much paperwork to fill out in regards to the rules. Ms. Martinet stated that providers of service are spending more time filling out paperwork than they spend treating people. Ms. Martinet asked that this be included in future discussion for rulemaking topics.

Dr. Richard Brunstetter, Committee member, stated that several times during this discussion there has been the mention of Medicaid. Dr. Brunstetter stated that he has little knowledge of how Medicaid works and would like to find a way of discussing their process.

Dr. Scheyett commented that one of the things that would be tremendously useful is to better understand the state and federal requirements for Medicaid.

Mr. Corne stated that all Committee members are welcome to attend RRC meetings. He added it might be possible to have counsel for the RRC speak to the Commission and explain their process.

Mr. Trobaugh recommended announcing in the major newspaper in North Carolina the agenda and what is happening in the Commission meetings. Mr. Corne stated that currently the meeting schedule is posted online. Mr. Hairston agreed, stating that the Division publishes the meeting schedule at the beginning of the year on the website to inform the public of upcoming meetings. Further, after the Commission has approved the minutes they are then posted on the website. Mr. Hairston added that advertising in newspapers would simply be too costly for the state and this is why it is done through the Division's website. Mr. Hairston acknowledged that the agenda for the meeting was not posted online prior to the meeting.

Ms. Brobst stated that everything should be available online on the Division website, with information on the topics of discussion for upcoming meetings.

Ms. Brobst redirected attention to the timeline guide. She noted that some rules were passed in less than three years. Ms. Brobst inquired why certain rules were withdrawn, and asked if they were Commission rules. Mr. Corne responded that the withdrawal of the rule is when there is an objection by the Rules Review and there can't be an agreement reached on the objection.

A Committee member asked if a motion was necessary at that time. Dr. Scheyett stated that there was no need for a motion. Dr. Scheyett stated that the Committee had received a number of great ideas and the best approach would be to summarize what was already said and to ensure that the Commission has rulemaking authority to promulgate the proposed rules. Dr. Scheyett added that the information will be prioritized and brought back before the Committee.

Sandra C. DuPuy, Committee member, asked if there was a reason why we could not post our agenda on the website and asked if the agenda could be more detailed. Dr. Scheyett responded that the staff always sends the agenda to the chairs of the Committees a few weeks prior to the meeting for input. Dr. Scheyett asked staff if the agendas could be posted to the website prior to future meetings if the chairs of the Committees promised to quickly review the agendas and flesh out topics that they believe are important for the Committees to review well in advance of the meetings. Mr. Hairston responded in the affirmative.

John Owen, Commission Member, stated that he would like to focus on raising the requirements for Qualified Professional. He asked that the Staff Qualification workgroup give a presentation of their work thus far on the Staff Definition rule.

Senate Bill 721 & Senate Bill 799

John R. Corne, Committee member, stated he wanted to bring the Committee's attention to a bill that was introduced (Senate Bill 721) to require the Commission to make rules regarding electronic surveillance at facilities for children and adolescents with mental illness or developmental disabilities while the clients are asleep. Additionally, Mr. Corne drew the Committee's attention to SB 799. The bill is intended to increase transparency in mh/dd/sas facilities as it pertains to death reporting requirements.

Mr. Hairston stated that there was a process within the Division to make a recommendation to the Department and its legislative liaison to make contact with the various legislators to discuss legislation and let General Assembly know what the Commission's and Division's comments are. Mr. Hairston stated that the Commission and Division usually take a position reflecting the following options: support, support with changes, or do not support. Mr. Hairston continued by stating if the Commission has comments on either bill that they would like for him to report back to the legislative liaison, he would be glad to do so.

Further Committee Business

John R. Corne, Committee member, stated that there had been a recent memorandum from the Office of State Budget Management (OSBM) regarding suspension of travel for the rest of the fiscal year. Mr. Corne added that this potentially applies to the Commission with respect to the upcoming May meeting. Mr. Corne stated that the Commission can ask OSBM for an exemption in order to hold the meeting. Mr. Corne stated that he was not sure that there were any pressing matters that could not wait until the August 2009 meeting. Mr. Corne further stated that he felt the Commission should consider making sacrifices that other agencies in the state are making. Mr. Corne then asked the Committee if they wished to cancel the meeting in May or request an exemption of the travel restriction from OSBM.

Several committee members stated they would forgo their travel reimbursement. Several members stated they wanted to request the waiver. Mr. Hairston noted that much of the costs associated with the meetings do not come from reimbursement for travel. The majority of the expenses come from the hotel rental and lunches.

Don Trobaugh, Committee member, suggested having the meetings at another location that is less costly. Mr. Corne stated that there are plenty of places the Commission could meet, but the Commission has a contract with the hotel. Mr. Corne asked the staff to draft a letter asking for the exemption and also asked staff to look for other state offices that would be available for meeting space.

There being no further business, the meeting adjourned at 11:46 a.m.